FILE COPY

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1950

No. 406

LOUIS R. BOYD, *Petitioner,*

vs.

THE COUNTY OF FRESNO, MELVIN A. WILLMIRTH, Sheriff of the County of Fresno, THE CIVIL SERVICE COMMISSION OF THE COUNTY OF FRESNO, State of California, and CARL FULLER, EARL L. EYMANN, WALTER H. WIEBE, CHARLES L. KAISER and WILLIAM STOCKBURGER, constituting the members of said Civil Service Commission, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI to the District Court of Appeal of the State of California, in and for the Fourth Appellate District.

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PETITION FOR A WRIT OF CERTIORARI

to the District Court of Appeal of the State of California, in and for the Fourth Appellate District.

Your Petitioner, Louis R. Boyd, respectfully prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of the State of Cali-

fornia in and for the Fourth Appellate District in the case entitled:

> "Julius Aluisi and Louis R. Boyd,
> Petitioners and Appellants,
>
> vs.
>
> The County of Fresno, Melvin A. Willmirth, Sheriff of the County of Fresno, The Civil Service Commission of the County of Fresno, State of California, and Carl Fuller, Earl I. Eymann, Walter H. Wiebe, Charles L. Kaiser and William Stockburger, constituting the members of said Civil Service Commission,
> Respondents."

and identified as 4 Civil No. 6035 in said Court. The Supreme Court of the State of California, upon application by Appellants, refused to review the judgment of the District Court of Appeal, its judgment and order denying a hearing being filed on April 20, 1960. A true copy thereof appears as Appendix A, infra, p. i.

OPINIONS BELOW.

The California Supreme Court rendered no written opinion in denying a hearing therein, but the opinion of the District Court of Appeal (filed February 26, 1960) is reported in 178 Advance California Appellate Reports 465 et seq., and a true copy thereof appears as Appendix B, infra, p. ....

The lower Court (the Superior Court of the State of California, in and for the County of Fresno), whose

judgment was before the District Court of Appeal, rendered a written "Memorandum Opinion and Order for Judgment" on December 18, 1958. Copy of this document together with that Court's findings and conclusions, as well as its formal judgment, appears as Appendix C, infra, p. xvi.

JURISDICTION.

As stated above, the order of the California Supreme Court refusing further review was filed on April 20, 1960. Upon formal application by Petitioner presented to the Clerk of this Court within the statutory period, Mr. Justice Black, on July 21, 1960, ordered that the time for filing this petition be extended to and including September 3, 1960. An order further extending said time to and including September 10, 1960, was subsequently (on August 24, 1960) granted by Mr. Justice Black on the basis of supplementary telegraphic application by Petitioner's counsel. These orders, and the applications therefor, were made in conformity with Rule 34 and 28 USC §2101(c).

The jurisdiction of this Court is invoked under the authority of 28 USC §1257 (3) providing specifically, in part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . .

"(3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the constitution, . . .".

The Supreme Court of the State of California is the highest Court of that State, and its judgment and order denying a hearing in this case after decision by the District Court of Appeal is a final judgment. However, since such order constituted a refusal to exercise its constitutional authority to review the judgment and decision of an intermediate Appellate Court, the District Court of Appeal is the highest court of the State of California in which a decision could be had in this action, hence it is its judgment and decision which is reviewable herein. *Sullivan v. Texas*, 207 US 416; *American Railway Express Co. v. Levee*, 263 US 19, 20-21; *Hammerstein v. Superior Court*, 341 US 491, 492; *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 US 157, 160. When the order denying a hearing was rendered by the California Supreme Court, the judgment and decision of the District Court of Appeal became final. *California Constitution*, Art. VI, sec. 4c; *Moran v. District Court of Appeal*, 15 California Reports, Second Series, 527.

STATEMENT OF THE CASE.

Petitioner and one Aluisi, then serving as Deputy Sheriffs of Fresno County, California, were discharged and removed from office September 26, 1956, under charges of inexcusable neglect of duty, immorality, insubordination and dishonesty. Following pre-

scribed permissive administrative procedures they appealed to the County Civil Service Commission for a hearing, at the conclusion of which the Commission found the charge of immorality untrue, but found that the remaining accusations were true, and upheld the action of the Sheriff in discharging both men and removing them from office. Subsequent mandamus proceedings to review the Commission's action resulted in the issuance of the writ by the local Superior Court (trial Court) directing a re-hearing because, for want of a complete transcript of the Commission's proceedings, proper judicial review could not be had. On appeal, the Superior Court's judgment was affirmed. The opinion of the District Court of Appeal appears as *Aluisi v. County of Fresno*, 159 California Appellate Reports, Second Series, 823.

Upon the directed rehearing (before a bare quorum of only three of the five Commissioners), the Commission made the same findings and order as before, except that the charge of immorality was ignored, it being treated as already disposed of at the first hearing. Again, mandamus proceedings were had in the Fresno County Superior Court, but this time the Commission's decision was upheld. On appeal to the District Court of Appeal the lower Court's judgment was affirmed and the State Supreme Court declined to review.

At all stages of these proceedings, from the start of the rehearing to the present time, Petitioner has protested that he was being denied that fair and impartial hearing guaranteed him by the Federal Constitution

because at least one of the three Commissioners sitting in judgment on his removal was biased and prejudiced against him, therefore not impartial. At the very opening of the rehearing Petitioner filed a formal affidavit of prejudice and objected to the participation therein of the Commissioners present. (Appendix B, infra, p. xviii.)

In the course of the mandamus proceedings, which followed the rehearing, Respondents called Commissioner Eymann as a witness to establish the fairness of the proceedings below. As said by the District Court of Appeal, Appendix B, infra, p. ix:

> "... Commissioner Eymann also testified that he did not believe some of the testimony of petitioners on material matters which they gave at the first hearing; that, with respect to such testimony, he believed they swore falsely. *This testimony by Eymann is uncontradicted.*" (Italics added.)

Nevertheless, the trial Court found the rehearing to have been fair, and the Appellate Court concurred. (Appendix B, infra, p. xi.)

The District Court of Appeal correctly stated (Appendix B, infra, p. x):

> "As a general rule, in judicial proceedings when a judge has stated that a party has given false testimony, even though his belief is founded on the evidence before him, he is disqualified from retrying the case. (*Keating v. Superior Court*, 45 California Reports, second series, 440, 444. (289 Pacific Reporter, second series, 209.)"

However, it then proceeds to the conclusion that there was nothing unfair about the rehearing in spite of Eymann's preexisting belief that Petitioner was a perjurer and the trial Court's judgment was affirmed.

Refusing to apply the foregoing general rule to this case, the Court makes the following rather astonishing statement (Appendix B, infra, p. xiii):

> "Commissioner Eymann testified that he believed petitioners had sworn falsely under oath *but did not testify that he believed their false swearing was willful*". (Italics added for emphasis.)

This statement clearly is not justified or supported by the record of Eymann's testimony quoted below. But, assuming the contrary, the Appellate Court has thus effectively held that the general rule above stated does not disqualify a judge from retrying a case for stating his belief that a party has sworn falsely unless his statement specifically, and in just so many exact words, includes the fact that such false swearing *was willful*. That such reasoning is not only fallacious but wholly inapplicable here is readily apparent from a reading of Eymann's testimony following (Reporter's Transcript on Appeal, pp. 71 and 72):

> "Q. (by Mr. Miller, counsel for Petitioners) Now at that first hearing, did you believe that the boys had not told the truth under oath?
>
> A. You mean to their officer, or to their testimony that they gave us?
>
> Q. Under oath, they would only be before you people.
>
> A. I don't think they were sworn, were they? Did we swear them? I guess we did.

Q. Now at that first hearing there——

A. Well, some of the things, some of them said, we believed that they weren't true. They weren't all untrue.

Q. But after you had arrived at a—I mean necessarily in arriving at your decision, in that particular case, you believed that the boys had sworn falsely under oath, isn't that correct. Or you wouldn't have found them guilty as charged, isn't that correct?

The Court. Now which is the question?

Mr. Miller. All right, I will reframe it. Q. Isn't it a fact that in order for you to arrive at your first decision, in the first hearing, that you believed that the boys had sworn falsely under oath?

A. Certainly, as to some of their testimony.

Q. And that was material testimony, things that you believed went to the heart of the case?

A. Of course much of the case was decided on evidence.

Q. I understand that.

A. Not on testimony, by these two boys.

Q. But I say, they themselves testified, did they not?

A. Yes.

Q. And you believed that they had not told you the truth under oath, with respect to material testimony, isn't that correct.

A. I think the testimony shows that there were some admissions.

Q. I am asking the question, you believe that they swore falsely, is that correct, at that hearing?

A. I want to say again, that not in every case, not every word they said.

Q. No, no, but on material testimony?
A. Certainly there was some."

QUESTIONS PRESENTED.

1. Whether due process demands of a state administrative tribunal the same degree of impartiality and freedom from bias and prejudice as is required of judicial officers.

2. Whether a member of a civil service commission is disqualified from participating in a rehearing, quasi-judicial in nature, because of his expressed and admitted conviction that the accused employee has sworn falsely in an earlier hearing on the same charges before the same tribunal.

CONSTITUTIONAL PROVISIONS INVOLVED.

The proceedings below, as well as the questions herein presented, necessarily involve the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, the text of which appears as Appendix E, infra, p. xxv.

REASONS FOR GRANTING THE WRIT.

The California Courts, in the situation presented by this case, have posed a most important question under the Fourteenth Amendment to the Constitution of the United States. The effect of the decision herein

sought to be reviewed is that in California one may be deprived of his liberty or property through proceedings before a quasijudicial state administrative tribunal the members of which are not held to our traditional moral and ethical standards of judicial honor, integrity and impartiality. Such decision is in probable conflict with a very long line of decisions by this Court to the general effect that due process requires a fair hearing before an impartial tribunal, for example: *In re Murchison*, 349 US 133; *U. S. v. Ju Toy*, 198 US 253; Japanese Immigrant Cases (*Yamataya v. Fisher*), 189 US 86; and *Morgan v. U. S.*, 304 US 1.

More particularly, the opinion and judgment of the State Court herein conflict with the concept expressed by Mr. Chief Justice Hughes in the *Morgan* case (*Morgan v. U. S.*, supra., at p. 15):

> ". . . in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play."

Nor do they meet the test expressed by Mr. Justice Black in the *Murchison* case (*In re Murchison*, supra) as follows:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness . . . This Court has said, however, that 'Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State

and the accused denies the latter due process of law'. *Tumey v. State of Ohio*, 273 US 510, 532, 47 S. Ct. 437, 444, 71 L. Ed. 749. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice'. *Offutt v. U.S.*, 348 U.S. 11, 14, 75 S. Ct. 11, 13".

Public respect for, and confidence, in all our now numerous quasijudicial administrative tribunals, whether State or Federal, is necessarily dependent upon the standards of moral and ethical propriety characterizing their proceedings. Habitually the citizenry looks to this Court to establish and announce the controls necessary to assure that proceedings before such tribunals will be marked by nothing less than fair play in all respects.

That the Petitioner herein, by virtue of his discharge and removal from his employment in the public service, has been deprived of valuable property rights is not doubted in the District Court of Appeal's decision; nor is the question even discussed. However, the decision of this Court last year in the case of *Greene v. McElroy*, 360 US 474, has answered this question in the affirmative. Thus the existence of a Federal question is established; does the manner of such deprivation by an administrative tribunal *not impartial* meet the Constitutional requirements of due process?

The California Statute governing the proceedings below (Section 1094.5, Code of Civil Procedure of California, Appendix D, infra, p. xxiii) simply codifies the long recognized authority of our Courts to review administrative proceedings to determine their fairness to the participants. Of course, this determination goes to the question of due process, and the power of this Court to do so has been expressed many times:

Ickes v. Underwood, 141 Fed.2d 546, 78 US App. D.C. 396, cert. denied 323 US 713.

Inherently, fairness must be deemed to require impartiality and absence of bias or prejudice on the part of those placed in position to deprive others of their liberty or property (*In re Murchison*, supra) no matter whether they be denominated "judicial" or "administrative" officials.

While the *Murchison* case involved judicial proceedings, as distinguished from administrative proceedings, surely the views expressed therein by Mr. Justice Black are equally applicable to proceedings of either nature, for it matters not at all to the citizen whose liberty or property is at stake whether those sitting in judgment upon him be called judicial officers or administrative officials. The citizen must be assured that in any event he will be judged fairly and impartially. True, as the California Court herein stated (Appendix B, infra, p. ii), the same niceties in procedure should not be required in the conduct of administrative hearings as in the case of judicial hearings, but this has nothing whatever to do with the right to be heard by an impartial tribunal. Further-

more, the enormously wide sphere of authority and activity of administrative tribunals in present day American business, professional and personal life demands that the same standards of fundamental disinterest and impartiality be applied to their proceedings as we have long characterized our more precise judicial processes.

It is of really vast importance and in the public interest for this Court, by review of the case the subject of this Petition, to make it clear once and for all that due process requires the same degree of fairness and impartiality in the conduct of *all* proceedings in which the liberty or property of our citizens may be taken from them, whether judicial or merely quasi-judicial in character. Such action by this Court will bring to their logical conclusion its earlier decisions which have not presented opportunity for the Court to take this important next step.

It appears rather obvious that if Eymann believed Petitioner herein to have "sworn falsely under oath" it necessarily follows that he believed it to have been done willfully, purposefully and intentionally. That this was Eymann's belief is also clearly borne out by the very nature of the offenses with which Petitioner was charged, as described in the statement of facts appearing in Appendix B, infra, pp. iii and v-vii. To interpret Eymann's testimony otherwise would seem to require a Court to approach the point of absurdity.

Comment is also required with regard to the resort by the District Court of Appeal to the "rule of ne-

cessity". (Appendix B, infra, p. xii.). That such rule has not the slightest application to the situation here is abundantly clear. For the Commission to have conducted a valid hearing it was required under its Rules to have a quorum present consisting of at least three of the five members. During the proceedings on mandamus Petitioner's counsel stated as follows (Reporter's Transcript on Appeal, p. 125):

> "I might point out to the Court I introduced in evidence the rules of the Commission, which were approved by the Board of Supervisors, and under the County Ordinance, which makes them with the same force and effect as though they were a law or ordinance passed by the County, and that provides that the Commission cannot sit unless there is a quorum present, and Section 5, under Rule 18:
>
> > 'A majority of the Commission shall constitute a quorum and no act of the Commission shall be valid or binding unless a majority of the members concur therein'."

Respondents unhesitatingly acknowledge that since the rehearing had been conducted by a bare quorum of three, if one member (Eymann, for example) were disqualified it would still be possible for the Commission to obtain a quorum and conduct a valid hearing. Counsel for Respondents at one point told the lower Court (Reporter's Transcript on Appeal, p. 53):

> "Again, speaking hypothetically, several things could happen. The Court might find that this one person is, or should have been, disqualified. Well, there are five men on the Commission, two of them didn't even take part in this matter. It

could well be, dependent, of course, upon the Court's ultimate finding, that there would still be a quorum of the Commission that could hear it, but supposing the worse happened, supposing all the Commission, or with the exception of the one that has had no connection with this case at all, were still disqualified, those gentlemen might conceivably resign, or there might be acting Commissioners appointed to hear this thing."

Resort to this rule was entirely gratuitous, unnecessary and erroneous, and, of even greater importance, begs the real Constitutional question.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated, Fresno, California,
September 1, 1960.

Respectfully submitted,

MAX M. HAYDEN,
Attorney for Petitioner.

JOHN W. GUERARD,
Of Counsel.

(Appendices A, B, C, D and E Follow.)

Appendix A

Order Due
April 26, 1960

4th District, Civ. No. 6033

In the Supreme Court of the State of California

In Bank

Aluisi et al.,

v.

County of Fresno, et al.

ORDER DENYING HEARING AFTER JUDGMENT BY DISTRICT COURT OF APPEAL

Appellants' petition for hearing denied.

Gibson,
Chief Justice.

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 20th day of April A.D. 1960.

(Seal) William I. Sullivan, Clerk
By J M R
Deputy Clerk

Stamped:
Filed Apr. 20, 1960.
William I. Sullivan, Clerk
By .....
S. F. Deputy

Filed Dist. Court of Appeal, Fourth Dist.
April 22, 1960
E. J. Verdeckberg, Clerk.
Lloyd E. Hidden, Deputy Clerk.

Appendix B

(Vol. 178 A.C.A. 465.)

In the District Court of Appeal
State of California
Fourth Appellate District

4 Civil No. 6035

Julius Aluisi and Louis R. Boyd,
Petitioners and Appellants,
vs.
The County of Fresno, Melvin A. Willmirth, Sheriff of the County of Fresno, State of California, The Civil Service Commission of the County of Fresno, State of California, and Carl Fuller, Earl J. Eymann, Walter H. Weibe, Charles L. Kaiser and William Stockburger, constituting the members of said Civil Service Commission, and Doe One, Doe Two, Doe Three and Doe Four,
Respondents.

Opinion

Petitioners are discharged deputy sheriffs of the County of Fresno who seek reinstatement. They were discharged by the sheriff of that county, one of the respondents herein, pursuant to a written order

of removal dated September 26, 1956, charging them with excusable neglect of duty. At that time they were permanent civil service employees. On November 7, 1956, the sheriff filed an amended order for removal with the civil service commission of that County charging petitioners with inexcusable neglect of duty, immorality, insubordination and dishonesty. Thereafter, in conformity to civil service regulations, petitioners appealed from the amended order of removal; a hearing thereon was held before that commission; the charges of inexcusable neglect of duty, insubordination and dishonesty were found to be true; and the charge of immorality was found to be untrue and the amended order of removal was affirmed. Subsequently, mandamus proceedings were instituted before the Superior Court of Fresno County to review this decision of the commission. Because the transcript of the proceedings before the commission was incomplete, due to a faulty mechanical recording and transcription process, the superior court entered judgment setting aside the commission's decision and directing a rehearing. This judgment was affirmed by this court on appeal. (Aluisi v. County of Fresno, 159 Cal.App.2d 823 [324 P.2d 920].)

Upon a rehearing the commission found the charges of inexcusable neglect of duty, insubordination and dishonesty to be true; made no finding on the charge of immorality, considering that charge to be disposed of by its former decision; and ordered that the amended order of removal be affirmed. The respondents Eymann, Wiebe and Kaiser were the only mem-

bers of the commission participating in the second hearing.

Petitioners instituted the instant proceeding in mandamus, asking for reinstatement upon the ground that the decision of the commission "was not supported by substantial evidence in the light of the whole record"; that they "were not given a fair and impartial trial . . . in that the members of the Commission . . . were biased and prejudiced against . . . them"; that the "commission refused to give any weight or consideration to the rating of the petitioners"; that the director of personnel participated in the deliberations of the commission; and that the commission refused to admit material evidence.

At the hearing before the trial court a transcript of the proceeding before the commission was introduced in evidence, together with testimony of witnesses respecting alleged statements by the respondents Eymann and Kaiser which petitioners claimed established bias and prejudice. The court found the allegations in the petition setting forth the grounds for reinstatement to be untrue, and entered judgment that the alternative writ of mandamus theretofore issued be discharged and that the peremptory writ of mandate be denied. From this judgment petitioners take this appeal.

Under section 1094.5 of the Code of Civil Procedure, in proceedings to judicially review the decision of a civil service commission the inquiry extends to questions involving jurisdiction, whether there was a fair trial, and whether there was any judicial abuse of

discretion. An abuse of discretion is established if the commission "has not proceeded in the manner required by law, the . . . decision is not supported by the findings, or . . . the findings are not supported by substantial evidence in the light of the whole record". (Code Civ. Proc., 1094.5 subd. (b)(c).)

There is substantial evidence in the record to support the following statement of facts: In the late evening of September 10, 1956, petitioners, as deputy sheriffs, while assigned to an automobile patrol of a designated beat in the unincorporated area on the outskirts of the city of Fresno, radioed headquarters for permission to patronize a drive-in eating establishment outside their assigned beat. Permission was granted; they proceeded to this establishment; had something to eat; and at 11:01 p.m. radioed to headquarters that they were back in service. However, they did not immediately return to their beat, but remained at the drive-in and engaged three teen-age girls in a conversation culminating in the petitioners driving away in their automobile, and by prearrangement, being followed by the girls in another automobile. At the intersection of Church and Maple Avenues, which was about 3 miles off their assigned beat, the sheriff's automobile drove into a walnut grove owned by the father of petitioner Abuisi. The automobile in which the girls were riding followed into the grove. The automobiles were stopped within a few feet of each other. Petitioner Boyd got out of the sheriff's car and approached the girls, one of whom got into the sheriff's car with Petitioner Abuisi. As to what occurred at this time there is sharp disagree-

ment; the girls testified to conduct on the part of petitioners of an immoral nature; petitioners testified they were in the grove only a few minutes asking the girls routine questions in the course of a proper investigation of suspected vice. Customarily petitioners returned to headquarters at 11:40 p.m. to file their reports preliminary to checking out at midnight. Not having heard from them, at 12:01 a.m. they were called by the radio operator at headquarters who requested their estimated time of arrival. Petitioner Aluisi responded to the call and replied, "in about 15 minutes." Petitioners returned to headquarters forthwith; made out their daily activity reports; but made no mention of any incident concerning an alleged vice investigation. On September 19, 1956, one of the girls was picked up as a runaway, and in the course of a resulting investigation she, and the other girls, told of the aforesaid incident. Petitioners were interrogated on several occasions and denied they had been with the girls on the evening in question; these denials were made to a detective sergeant of the juvenile department, later to their superior officer, a lieutenant in the sheriff's office, and on another occasion to their captain and the same lieutenant. After this, petitioner Boyd queried the lieutenant respecting the acceptability of a false alibi. On September 22, 1956, petitioner Boyd contacted the lieutenant and stated that he had decided to tell the truth. He signed a written statement in which he admitted being with the girls in the walnut grove pursuant to their prearrangement, but denied any acts of immorality. Petitioner Aluisi,

in the presence of the lieutenant, became angry when it appeared that Boyd was going to confess and called the latter a profane name. Prior to this time petitioner Aluisi claimed that he had no previous acquaintance with the girls, but another deputy sheriff testified that during the first week in September, 1956, Aluisi asked him if he wanted a date; that he knew some girls who were "all set to go"; and that he gave a description of one of the girls. The description in question fitted the description of the girl who got into the automobile with Aluisi at the walnut grove. At no time did either petitioner report to the sheriff as required by regulations, that they were investigating any suspected vice. A criminal complaint filed against petitioners, charging them with contributing to the delinquency of minors, was dismissed after preliminary hearing, for want of probable cause. As heretofore noted, the commission, after the first hearing, found the charges of immorality untrue.

The authority of the trial Court, in judging the sufficiency of the evidence to sustain the decision of the commission, was confined to a determination as to whether, in the light of the whole record, there was substantial evidence before the commission to support its findings. (Damiani v. Albert, 48 Cal.2d 15, 17 (306 P.2d 780).) Applying this rule to the foregoing statement of facts, we conclude that the findings of the commission and of the trial Court, that the charges against petitioners of inexcusable neglect of duty, insubordination and dishonesty were true, are adequately supported.

Petitioners claim that the record as a whole establishes that the sheriff would not have discharged them except for the alleged acts of immorality which were found not to be true and for that reason the findings are not supported by the evidence under the rule as stated. This contention, instead of being based on the record as a whole was based on selected answer to a question asked the sheriff. We have examined the record and determined that the testimony in question, when considered in connection with the whole record, does not sustain their contention.

Preceding the second hearing, petitioners filed a verified written statement with the commission objecting to the participation of the members thereof in that hearing, upon the ground that they were biased and prejudiced. Only three of the five commissioners actually participated in the hearing. As to these, the basis for the objection was that each of them had participated in the first hearing and by reason thereof had prejudiced the outcome of the case; that they did not believe the testimony of petitioners at the first hearing; that they were of the opinion that petitioners had not told the truth at that hearing. In addition, as to Commissioner Eymann, it was stated that he had told Boyd that Ahuisi was no good, and it would serve no purpose to have a new hearing as to his case. The members of the commission did not file any affidavits in reply to the verified statement. They considered the objections made, overruled them; and proceeded with the hearing before the three commissioners heretofore named. It should be noted, however, that the verified statement also set forth grounds of objection to the

other two commissioners, alleging that one was a deputy sheriff and the other a member of the sheriff's posse. As these two men did not participate in the second hearing, no cause of complaint can be based on these facts. At the trial in the instant proceeding it was also contended that Commissioner Kaiser was prejudiced and biased against petitioners because, when asked a question by petitioners' attorney during the commission hearing, Kaiser said, "I am afraid of being misquoted." It is contended that this remark was derogatory; was directed toward the attorney; and is grounds for disqualification under the rule in Woolley v. Superior Court, 19 Cal.App.2d 611, 626 (66 P.2d 680). However, the evidence before the trial court established that a newspaper reporter was also present and it may be concluded that Kaiser had this fact in mind when making the statement in question. Commissioner Eymann testified before the trial Court and denied making the statements attributed to him in the verified statement filed with the commission. The Court found the allegations respecting bias and prejudice to be untrue. Where the sufficiency of the evidence to sustain a finding is questioned on appeal, and the record presents a conflict of testimony and inferences upon that issue, the Court must accept that testimony and those inferences which will support the finding. (Thomas v. Hunt Mfg. Corp., 42 Cal.2d 734, 736 (269 P.2d 12).) These observations would dispose of the contentions respecting bias and prejudice except for the fact that Commissioner Eymann also testified that he did not believe some of the testimony of petitioners on material matters which they

gave at the first hearing; that, with respect to such testimony, he believed they swore falsely. This testimony by Eymann is uncontradicted.

As a general rule, in judicial proceedings when "a judge has stated that a party has given false testimony, even though his belief is founded on the evidence before him, he is disqualified from retrying the case." (Keating v. Superior Court, 45 Cal.2d 440, 444 (289 P.2d 209).).

The foregoing state of the record requires a determination whether the participation of the commissioners in the first hearing, or the state of mind of Commissioner Eymann respecting the prior false testimony of petitioners resulted in depriving them of a "fair trial." The term "fair trial" as used in section 1094.5 of the Code of Civil Procedure, as applied to these proceedings, means a fair trial under the circumstances of this case.

The results of the second hearing were the same as the results of the first hearing with this exception: there is a complete record of the second hearing, whereas, there was not such as to the first hearing. The only reason the second hearing took place was because the trial Court, in a mandamus proceeding, was prevented from inquiring into the validity of the first commission order because the record of the hearing culminating in that order was incomplete. The law does not provide that a civil service employee shall have two hearings before two different commissions, or other reviewing bodies, because of a defect in a recording process which rendered impossible a proper

review of the first hearing. Under these circumstances we do not believe there is anything unfair in the second hearing before the same members of a commission who participated in the first hearing. Neither do we believe that under the circumstances of this case there was anything unfair in the second hearing because one of the commissioners believed that petitioners had testified falsely in the prior hearing. The trial Court found that the commission hearing here under review was fair, and we concur in that finding.

In support of their position, petitioners cite Calhoun v. Superior Court, 51 Cal.2d 257 (331 P.2d 648); Keating v. Superior Court, 45 Cal.2d 440 (289 P.2d 209), and Evans v. Superior Court, 107 Cal.App. 372 (290 P. 662); which apply the general rule heretofore stated to judicial proceedings. While proceedings before a civil service commission are quasi judicial in nature (Garvin v. Chambers, 195 Cal. 212, 216 (232 P. 696); Nider v. Homan, 32 Cal.App.2d 11, 15 (89 P.2d 136), they are not within the regulatory provisions of the Code of Civil Procedure and are not to be "marked by the refinement and subtleties which are characteristic of the conduct of actions in Courts of law." (Dyment v. Board of Medical Examiners, 57 Cal.App. 260, 265 (207 P. 409). See also Gipner v. State Civil Service Com., 13 Cal.App.2d 100, 106 (56 P.2d 535); Anderson v. Board of Medical Examiners, 117 Cal.App. 113, 115 (3 P.2d 344).). On the other hand, the practice before a Court, by analogy, has been used to judge the propriety of proceedings before such a commission. (Nicholas v. Sunderland, 77 Cal.App. 627, 637 (247 P. 614); Dyment v. Board of Medical

Examiners, 57 Cal.App. 260, 266 (207 P. 409).). The civil service ordinance in question, or the rules and regulations adopted pursuant thereto did not authorize an employee to challenge a member of the commission for bias or prejudice, nor did they provide a method by which such a challenge should be presented or acted upon. On the other hand, the law directs the Court reviewing a decision of such a commission to inquire whether there was a fair trial. A fair trial contemplates an impartial trial. (Saks & Co. v. City of Beverly Hills, 107 Cal.App.2d 260, 265 (237 P.2d 32).). Nevertheless, even though it be assumed that the principle conferring the right of disqualification in judicial proceedings applies to and controls a determination whether a civil service hearing was fair, the application of that principle to the facts at bar requires an affirmance of the judgment of the trial Court.

The mere fact that the members of the commission who made the decision under consideration participated in the first hearing did not disqualify them in the second hearing. (Keating v. Superior Court, 45 Cal.2d 440, 447 (289 P.2d 209).). Moreover, as the commission was the only administrative agency authorized to pass upon petitioners' appeal, under a rule of necessity, it was their obligation to proceed with the hearing. (Caminetti v. Pacific Mutual L. Ins. Co. 22 Cal.2d 344, 366 (139 P.2d 908); Seamell v. Wolff, 86 Cal.App.2d 489, 492 (195 P.2d 536).).

"By the great weight of authority, a judge or an officer exercising judicial functions may act in a proceeding wherein he is disqualified by interest, re-

lationship, or the like, if his jurisdiction is exclusive and there is no legal provision for calling in a substitute, so that his refusal to act would prevent absolutely a determination of the proceedings.'". (Nider v. Holman, 32 Cal.App.2d 11, 17 [89 P.2d 136].). Besides, by a judgment which now is final, the respondent commission was directed to rehear petitioners' appeal. (Aluisi v. County of Fresno, 159 Cal.App.2d 823 [324 P.2d 920].).

In passing on their own qualifications, after challenge for bias or prejudice, the commission followed the practice formerly applicable in judicial proceedings to disqualify a judge upon the same grounds. (Evans v. Superior Court, 107 Cal.App. 372, 382 [290 P.2d 662].)

The failure of the members of the commission to deny, in writing under oath, the charges made against them was not an admission of those charges as there was no law, rule or regulation requiring them to do so. In this regard the case at bar is distinguishable from the cases cited by petitioners.

With respect to the charge against Commissioner Eymann, a distinguishing fact is that, in the cited cases the judge, previous to the hearing or trial thereon in question, had expressed his belief that the party to the action seeking to disqualify him had wilfully testified falsely. Such is not the fact in the instant case. Commissioner Eymann testified that he believed petitioners had sworn falsely under oath but did not testify that he believed their false swearing was wilful.

"In deciding questions of fact a judge may often reject the testimony of a party, but this does not necessarily indicate that he believes that the party was guilty of deliberate falsification. The rejection of the testimony may have been the result of a consideration of the ability of the party to observe or remember, and in such a situation failure to accept a party's version of the facts does not show that the judge is biased or prejudiced against him." (Keating v. Superior Court, 45 Cal.2d 440, 444 (289 P.2d 209).)

It is noteworthy that, in the case at bar, the commission unanimously believed the testimony of the petitioners denying their involvement in acts of immorality with the girls who were the subject of their investigation. This is an additional factor which the trial Court was entitled to consider in reaching a decision as to whether the petitioners had a fair trial. It must be assumed that the trial judge inferred that the members of the commission did not reject the whole of the testimony of petitioners because a part thereof may have been false; that said members did accept part of that testimony and based a finding in favor of petitioners thereon; and that the mental attitude of respondent commissioners was not prejudiced or biased but impartial.

Petitioners' remaining contentions involve questions concerning the admission and rejection of testimony and are wholly without merit. Refinements respecting admissibility of evidence incident to a trial before a Court are not essential to a fair hearing before a civil service commission. (Gipner v. State Civil Serv-

ice Com., 13 Cal.App.2d 100, 106 (56 P.2d 535).) A transcript of the testimony of one of the teen-age girls, taken at the first hearing, was admitted into evidence because of her inability to be present at the second hearing. The petitioners objected to this testimony on the ground that the record of the first hearing was incomplete. The fact that the record of that hearing as a whole was incomplete, is not proof that a transcript of the testimony of any single witness contained in that record was incomplete. The petitioners' objection was properly overruled. The commission's refusal to permit the sheriff to be cross-examined with respect to the disciplinary action he had taken in other cases, involving other offenses and other officers, did not constitute an abuse of discretion. The contention that the commission did not consider petitioners' efficiency report in arriving at a decision has no basis in fact. The reports were in evidence, the weight to be given such reports was a matter for the trier of facts to determine.

The remaining grounds set forth in the petition, viz., that the commission acted arbitrarily, capriciously and fraudulently, and that the director of personnel participated in the deliberations of the commission are not supported by the record and have not been argued on appeal.

The judgment is affirmed.

Coughlin, J.

Griffin, P. J., and Shepard, J., concurred.

Filed February 26, 1960.

E. J. Verdeckberg, Clerk.

Appendix C

In the Superior Court of the
State of California
In and for the County of Fresno

MEMORANDUM OPINION AND ORDER FOR JUDGMENT

This is a mandate proceeding to review the decision of the Civil Service Commission of the County of Fresno which upheld the discharge by the sheriff of the County of Fresno of the petitioners as deputy sheriffs.

In an "Amended Order for Removal From Position and Order for Immediate Suspension," dated November 7, 1956, the sheriff of the County of Fresno stated as his reasons therefor that each of the petitioners was guilty of inexcusable neglect of duty, immorality, insubordination and dishonesty. The petitioners duly appealed to the Fresno County Civil Service Commission and at an earlier hearing the Commission sustained all of the charges, except that of immorality. A mandate proceeding was thereafter commenced by the petitioners in the Superior Court of the County of Fresno (Julius Aluisi vs. The County of Fresno, et al., #98659, and Louis R. Boyd vs. The County of Fresno, #98661, consolidated for hearing). This Court then issued a Peremptory Writ of Mandate requiring the Civil Service Commission to rehear the case because an accurate record of the proceedings had not been kept and the Court was consequently unable to determine whether the Findings of the Commission were supported "by substantial evidence in the light of the whole record." That decision was up-

held on appeal (Aluisi vs. County of Fresno, and Boyd vs. County of Fresno, 159 ACA 934).

Pursuant to the mandate of this Court, the Civil Service Commission held a new hearing and reconsidered the question whether the Order of Dismissal of the sheriff should be upheld; after the second hearing, the Commission filed its Findings and Decision on October 7, 1958 and made its Order as follows:

> "It Is, Therefore, Ordered by unanimous vote of the Commission that the Amended Order made by Melvin A. Willmirth, Sheriff-Coroner, removing Julius Aluisi from the position of Deputy Sheriff, and the Amended Order made by Melvin A. Willmirth, Sheriff-Coroner, removing Louis R. Boyd from the position of Deputy Sheriff, be, and the same are hereby affirmed."

A Petition for Writ of Mandate was filed herein on November 3, 1958, and after due proceedings, the hearing thereon was held before this Court on December 10, 1958.

The power of this Court to review the action of the Civil Service Commission is strictly limited by the provisions of Section 1094.5 (b and c) to an inquiry whether the Commission has proceeded in excess of jurisdiction, whether there was a fair trial, whether there was any prejudicial abuse of discretion and, in the latter respect, whether the Findings of the Commission are supported by substantial evidence in the light of the whole record. This Court has no right under the law to try the cause de novo, except in an unusual situation as that referred to in the case of Saks & Company vs. City of Beverly Hills, 107 Cal. App.2d 260, in which a petitioner alleges and proves

that the local Board has acted arbitrarily, capriciously or fraudulently, or in which the Commissioners are disqualified to act.

After a thorough consideration of the record (including the 51½ pages of the reporter's transcript of the hearing before the Civil Service Commission,) this Court concludes:

(1) That the Civil Service Commission had jurisdiction of this matter; (2) that the Commissioners who participated in the hearing were not disqualified; (3) that the petitioners had a fair trial; (4) that this Court has no power in the circumstances presented by the record to order a trial de novo in this Court; and (5) that the Findings and Order of the Commission are supported by substantial evidence in the light of the whole record.

Accordingly, It Is Ordered that the petitioners take nothing by their petition herein, that the Alternative Writ of Mandate be discharged, that a Peremptory Writ of Mandate be denied and that respondents have judgment for their costs of suit incurred herein. Counsel for respondents shall prepare, serve and deliver to the Court within ten days hereafter, proposed Findings of Fact and Conclusions of Law, and a proposed Judgment, in accordance herewith.

Dated December 18, 1958.

Philip Conley,
Judge of the Superior Court

Filed Dec. 18, 1958
J. L. Brown, Clerk
By D. G. Hurst, Deputy

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After due proceedings, the above-entitled cause came on regularly for hearing on the 10th day of December, 1958, before the Court sitting without a jury, Jack Miller, Esq., appearing for the petitioners, and Robert M. Wash, County Counsel, for the respondents; and evidence both oral and documentary, including the whole of the record of the proceeding before the Civil Service Commission in said matter, having been introduced and the cause submitted for decision, the Court now makes its findings of fact as follows:

FINDINGS OF FACT

1. That it is not true as alleged in Paragraph XI of the Petition for Writ of Mandate, or otherwise, that there was a prejudicial abuse of discretion, or any abuse of discretion by the respondent Civil Service Commission of the County of Fresno, and in this respect, the Court specifically finds that the Findings and Order of the Commission are supported by substantial evidence in the light of the whole record.

2. That it is not true, as alleged in Paragraph XII of the Petition for Writ of Mandate, or otherwise, that petitioners were not given a fair and impartial trial, or that either petitioner was not given a fair and impartial trial at the hearing before said Civil Service Commission, and it is not true that the members of the Commission holding said hearing were, or that any of them was, biased and prejudiced, or biased or prejudiced against petitioners, or either of them, and it is not true that said Commission acted arbi-

trarily, capriciously and fraudulently, or arbitrarily, capriciously or fraudulently, or that said hearing was wrongfully or improperly conducted in any manner, as alleged in said Paragraph 2 of the Petition, or otherwise. The Court finds that it is true that the question of the weight or consideration to be given to the ratings of the petitioners was a question lying within the sound discretion of the Commission, and that the comments, if any, of the Director of Personnel and Secretary of said Commission were fair and impartial, and that they were not intended to, and did not in any way, influence the decision of the Commission, but merely provided the Commission with a statement of certain provisions of law and of certain rules and regulations of the Commission upon request; that the Court further finds that said Commission did not wrongfully, or otherwise, refuse to admit material evidence.

3.—The Court finds that no sum of money is due, owing or unpaid by the County of Fresno to petitioners, or to either of them.

4. In response to the allegations of Paragraph XV of the Petition, the Court finds that under the law, the petitioners had the right to resort to a proceeding in mandate to review the Findings and Order of the Civil Service Commission.

5. The Court finds that said Civil Service Commission had jurisdiction of said proceeding, that none of the Commissioners participating in the said hearing was disqualified, and that the petitioners had a fair trial before said Commission.

CONCLUSIONS OF LAW

As conclusions of law, from the foregoing evidence, the Court finds:

1. That the respondent Civil Service Commission had jurisdjction of this matter.

2. That none of the Commissioners participating in the hearing was disqualified.

3. That the petitioners had a fair trial and hearing before the Commission.

4. That the Findings and Order of the Commission were, and each thereof was, supported by substantial evidence in the light of the whole record.

5. That this Court has no power in the circumstances presented by the record to order a trial de novo in this Court.

6. That the Alternative Writ of Mandate should be discharged and that a Preemptory Writ of Mandate should be denied.

7. That respondents are entitled to a judgment against petitioners for their costs of suit.

It Is Ordered that judgment be entered accordingly.

Dated December 31st, 1958.

Philip Conley,

Judge of the Superior Court

Filed Dec. 31, 1958
J. L. Brown, Clerk
By D. G. Hurst, Deputy

JUDGMENT

After due proceedings, the above-entitled cause came on regularly for hearing on the 10th day of December, 1958, before the Court sitting without a jury, Jack Miller, Esq., appearing for the petitioners, and Robert M. Wash, County Counsel, for the respondents; and evidence both oral and documentary having been introduced and the cause submitted for decision, and the Court having heretofore made and caused to be filed herein its written findings of fact and conclusions of law, and being fully advised;

Wherefore by reason of the law and the findings of fact aforesaid, it is Ordered, Adjudged, and Decreed that the petitioners take nothing by their petition herein, that the Alternative Writ of Mandate be discharged, that a Peremptory Writ of Mandate be denied, and that respondents have judgment for their costs of suit incurred herein. $138.70

Dated December 31st, 1958.

Philip Conley,
Judge of the Superior Court

Filed Dec. 31, 1958
J. L. Brown, Clerk
By D. G. Hurst, Deputy

Entered in Judgment Book
No. 167 at Page 65
This 31st day of Dec. 1958.

Appendix D

STATUTE OF STATE OF CALIFORNIA

Code of Civil Procedure of California

Section 1094.5

Subdivisions (a), (b) and (c)

(Adopted 1945, Amended 1949)

1094.5. Writ Issued—Purposes to Inquire Into Validity of Final Administrative Order—Costs.—(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer, the case shall be heard by the Court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board or officer may be filed with the petition, may be filed with respondent's points and authorities or may be ordered to be filed by the Court. If the expense of preparing all or any part of the record has been borne by the prevailing party, such expense shall be taxable as costs.

(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner

required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the Court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the Court determines that the findings are not supported by the weight of the evidence; and in all other cases abuse of discretion is established if the Court determines that the findings are not supported by substantial evidence in the light of the whole record.

Appendix E

CONSTITUTION OF THE UNITED STATES

Amendment 14

(Adopted July 28, 1868)

SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.